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NO.88-187

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

Supreme Court, U.S.

FILED

AUG 19 1988

JOSEPH F. SPANIOLO, JR.
CLERK

HOWARD GROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should decline to review the appellate court's conclusion that the cross-examination of petitioner at the hearing on his motion to suppress was appropriate where the appellate court decision was correct and was solely based on state law; where the claim that petitioner's Constitutional rights were violated was never raised below; and where the issue was never presented in the petition for leave to appeal to the Illinois Supreme Court.

II. Whether this Court should decline to consider whether petitioner was proven guilty beyond a reasonable doubt where petitioner has failed to raise any federal question, and has raised only issues of fact which are not matters of general importance meriting this Court's attention; and where, in any event, petitioner was proven guilty beyond a reasonable doubt.

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I.

THIS COURT SHOULD DECLINE TO REVIEW THE APPELLATE COURT'S CONCLUSION THAT THE CROSS-EXAMINATION OF PETITIONER AT THE HEARING ON HIS MOTION TO SUPPRESS WAS APPROPRIATE BECAUSE THE APPELLATE COURT'S DECISION WAS CORRECT AND WAS SOLELY BASED ON STATE LAW; BECAUSE THE CLAIM THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WAS NEVER RAISED BELOW; AND BECAUSE THE ISSUE WAS NEVER PRESENTED IN THE PETITION FOR LEAVE TO APPEAL TO THE STATE SUPREME COURT....

II.

THIS COURT HAS NO GOOD
REASON TO CONSIDER WHETHER
PETITIONER WAS PROVEN GUILTY
BEYOND A REASONABLE DOUBT
BECAUSE PETITIONER HAS FAILED
TO RAISE ANY FEDERAL QUESTION,
AND HAS RAISED ONLY ISSUES OF
FACT WHICH ARE NOT MATTERS OF
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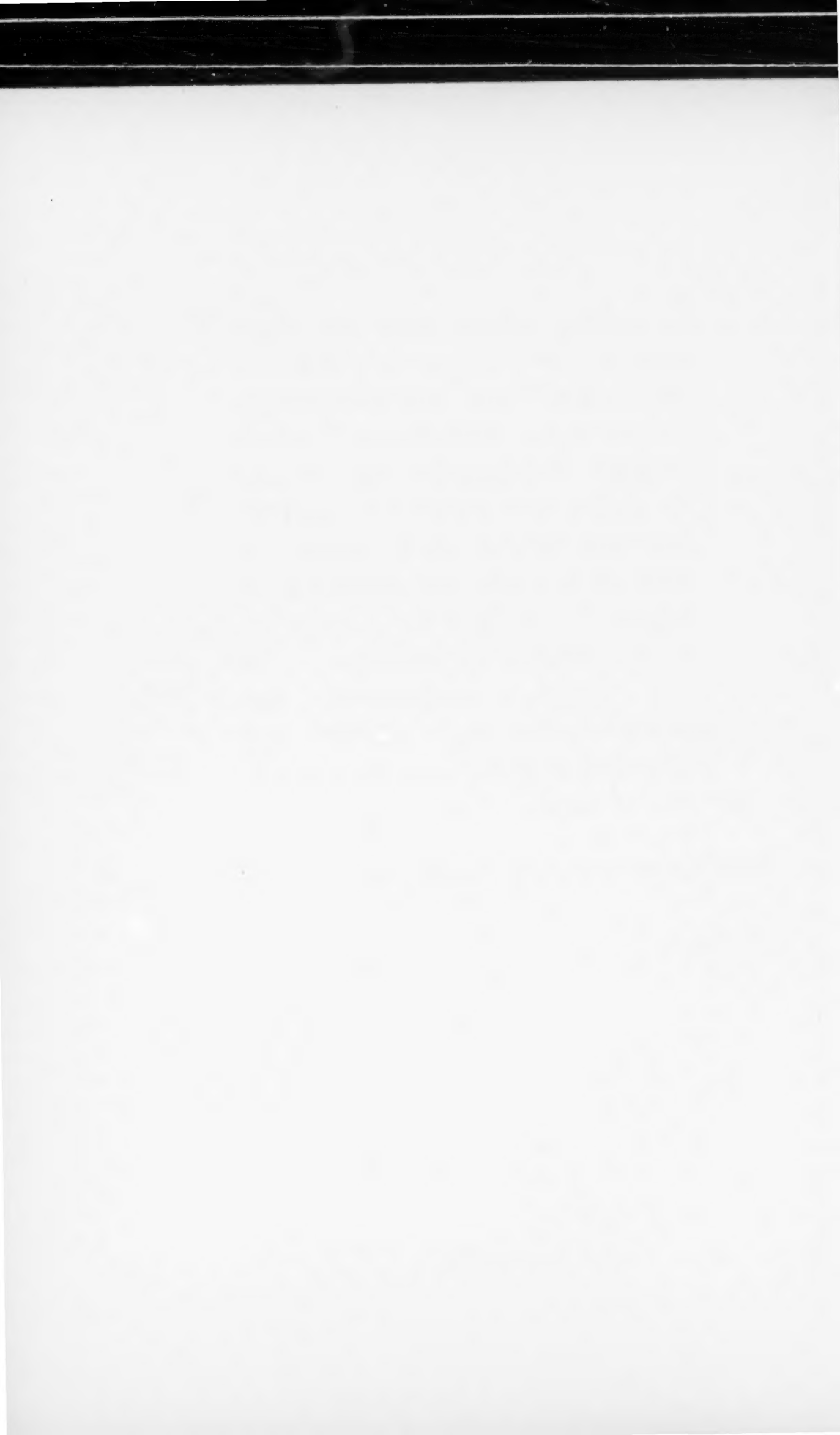


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OPINION BELOW

The opinion of the Illinois Appellate Court in the above entitled cause, dated February 8, 1988, affirmed the judgment of conviction which was entered by the Circuit Court of Cook County. The opinion of the Appellate Court is reported at 166 Ill. App. 3d 413, 519 N.E.2d 1043 (1st Dist. 1988). On June 3, 1988 the petition for

leave to appeal to the Illinois Supreme Court was denied. 122 Ill. 2d 576 (1988).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. Sec. 1257(3). However, as to Issue I, there is no basis for review since this issue was resolved in the appellate court on adequate and independent state grounds; the issue, couched in Constitutional terms, was never raised prior to the instant petition; and the issue was not raised at all in the petition for leave to appeal to the Illinois Supreme Court. Further, this Court should decline review as to Issue II because the issue presents no federal question and the issue presents no question of general importance that would merit consideration by



this Court. Thus, petitioner has failed to present grounds warranting a grant of certiorari.

STATEMENT OF THE CASE

Petitioner was indicted for murder and armed violence. Petitioner's pre-trial motion to suppress was denied after a hearing. Petitioner was convicted of murder (with which the armed violence charge merged) after a bench trial and was sentenced to twenty years in prison.

REASONS FOR DENYING T
PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT SHOULD DECLINE TO REVIEW THE APPELLATE COURT'S CONCLUSION THAT THE CROSS-EXAMINATION OF PETITIONER AT THE HEARING ON HIS MOTION TO SUPPRESS WAS APPROPRIATE BECAUSE THE APPELLATE COURT'S DECISION WAS CORRECT AND WAS SOLELY BASED ON STATE LAW; BECAUSE THE CLAIM THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WAS NEVER RAISED BELOW; AND BECAUSE THE ISSUE WAS NEVER PRESENTED IN THE PETITION FOR LEAVE TO APPEAL TO THE STATE SUPREME COURT.

Petitioner asks that a writ of certiorari issue to review what he alleges, for the first time through the instant petition, to be a violation of his Fifth



Amendment rights. Petitioner claims that he was subjected to overbroad cross-examination when he testified during the hearing on his motion to suppress and petitioner now claims that because of the allegedly improper cross-examination his Constitutional rights were violated. Not only was this issue correctly decided by the Illinois Appellate Court, First District, solely under Illinois law, petitioner never raised an issue involving his federal Constitutional rights in the state court. And, though petitioner filed a petition for leave to appeal to the Illinois Supreme Court, he did not seek review of this issue in any form before that court.

In the hearing on petitioner's pre-trial motion to suppress evidence and statements, petitioner testified in his own behalf. (R. 4) On direct examination



petitioner testified that on the day of the shooting the police came to his house without a warrant. (R. 7) Petitioner opened his door in response to their knock and sat down as the officers quietly entered his apartment. (R. 7) Petitioner told the officers where he had put his gun. (R. 8) On cross-examination the trial court allowed the petitioner to be questioned as to whether he knew why the police were at his home. (R. 9-31)

In the Illinois Appellate Court, petitioner argued that the trial court improperly allowed the cross-examination to exceed the scope of direct examination and, as a result, he was prejudiced. Petitioner made no claim in the Illinois Appellate Court, as he does in this petition, that he was coerced into waiving his rights against self incrimination in order to assert his



rights against unreasonable searches and seizures. (Pet. for Writ of Cert. 6)

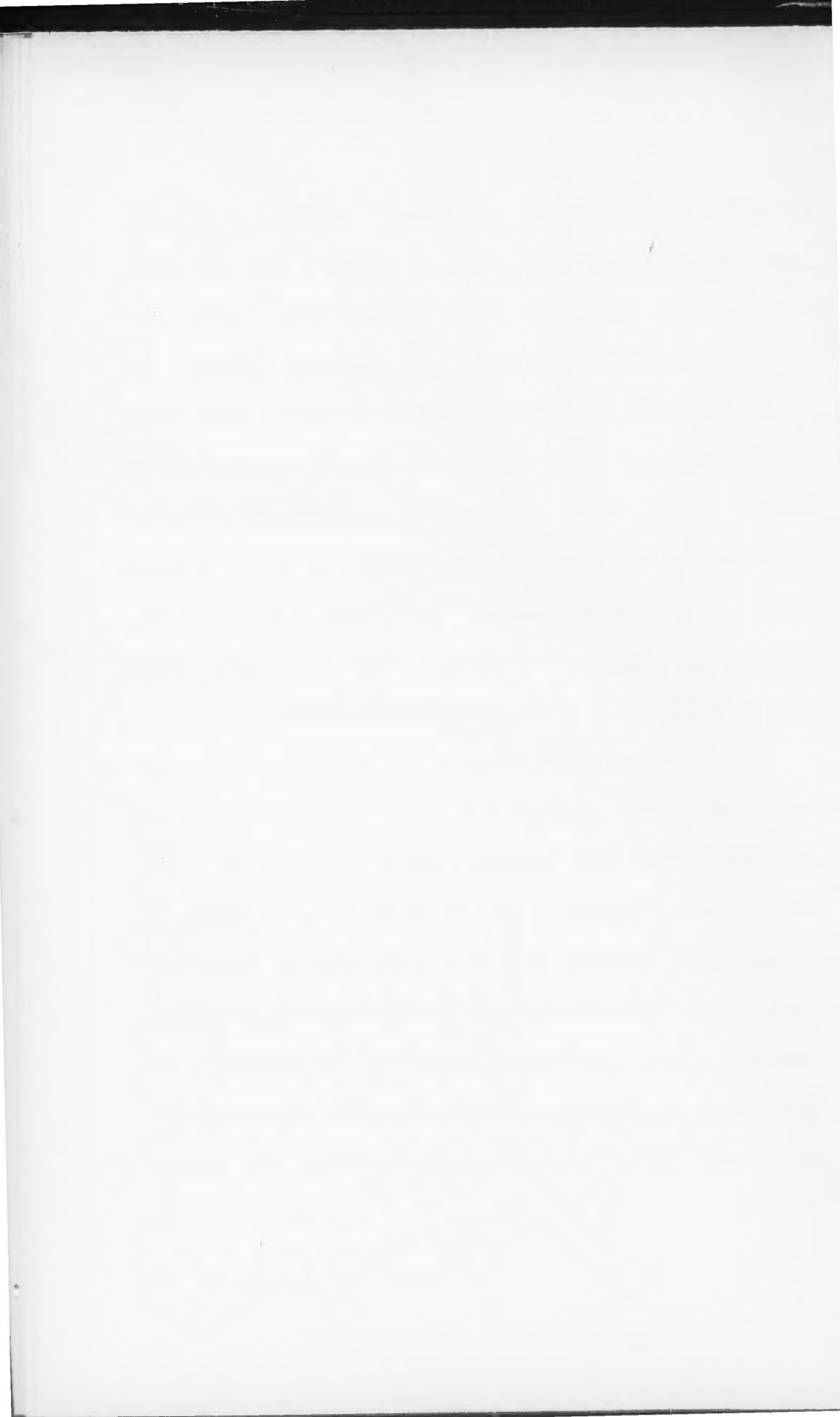
The Illinois Appellate Court found that the cross-examination of the petitioner was proper, and that the use of the testimony at trial for impeachment purposes was appropriate and within the court's discretion. (App. Ct. Op. at 11) The decision of the appellate court was based solely on Illinois law and was correct.

This Court has consistently held that where a state court judgment rests on adequate and independent state grounds, both substantive and procedural, this Court will decline to review the judgment. Henry v. Mississippi, 379 U.S. 443, 446 (1965). In the instant case, the appellate court opinion rests solely on principles of Illinois law. The principle that cross-examination may develop all circumstances within the



knowledge of the witness which explain, qualify, discredit or destroy his direct testimony, as was the situation here, is rooted in Illinois law. People v. Perez, 98 Ill. App. 3d 64, 70, 423 N.E.2d 964, 968 (4th Dist. 1981). Also resting on Illinois law is the appellate court's finding that petitioner's hearing testimony was properly used for impeachment purposes at trial. People v. Smith, 67 Ill. App. 3d 952, 958, 358 N.E.2d 707, 711 (5th Dist. 1978).

The appellate court did not consider the Constitutional dimension now proposed by petitioner because it was not heretofore raised. A federal claim must be raised or passed on in the state court in order for the United States Supreme Court to invoke its jurisdiction to consider it. Illinois v. Gates, 462 U.S. 213, 219 (1983). And, it is not sufficient merely to allege



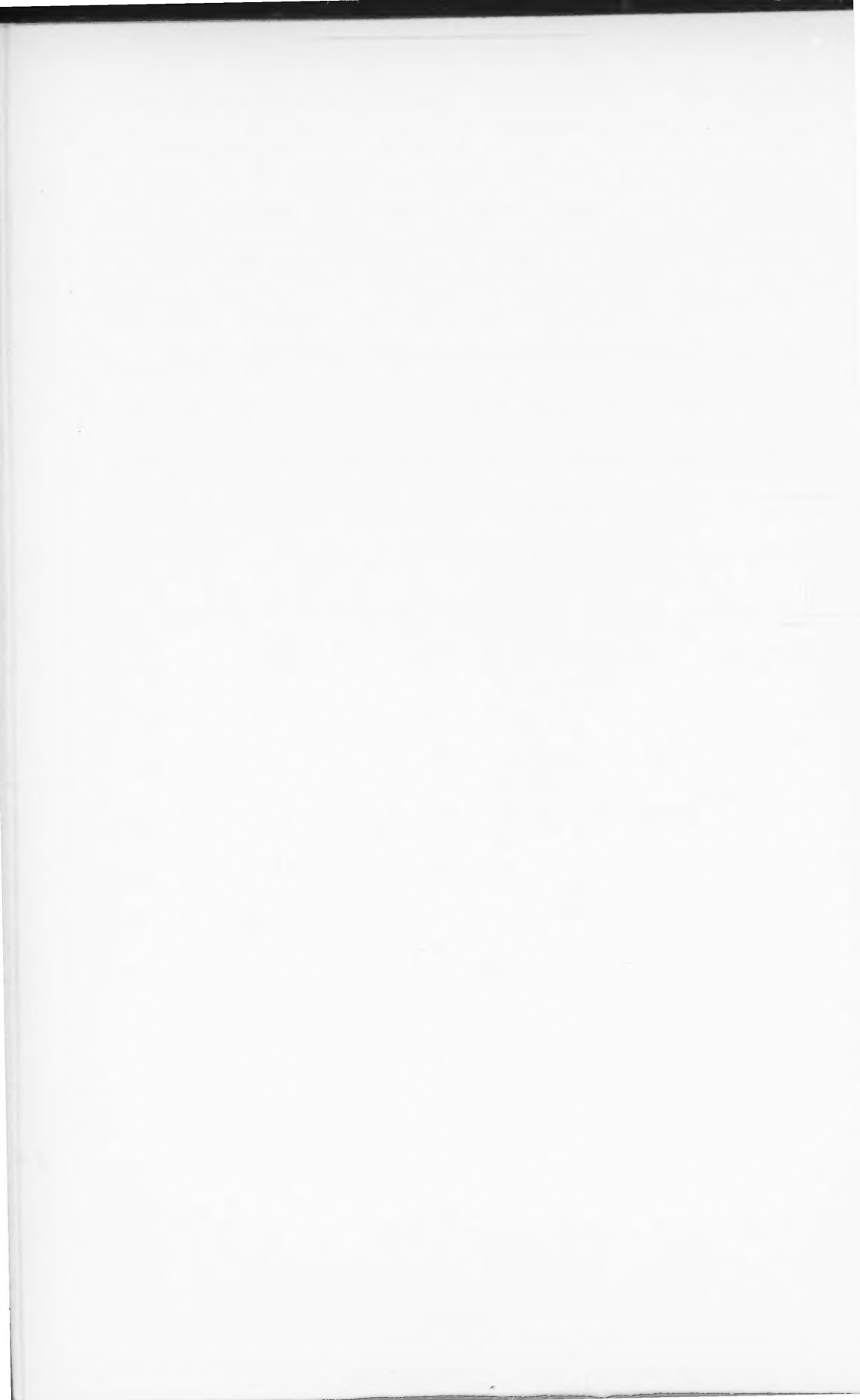
the facts necessary to make a Constitutional claim while making a similar state law claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Thus, since this issue was neither raised, at least not in terms of a Constitutional violation, nor considered in the court below, this Honorable Court is without a reason to consider it.

And, in his petition for leave to appeal to the Illinois Supreme Court, petitioner raised no issue at all regarding the breadth of cross-examination at the motion to suppress. Thus, since the issue was neither presented to the Illinois Supreme Court in the petition for leave to appeal nor was it considered when that court denied the petition, this Court has no basis to review the issue.

In conclusion, the Illinois Appellate Court correctly applied Illinois



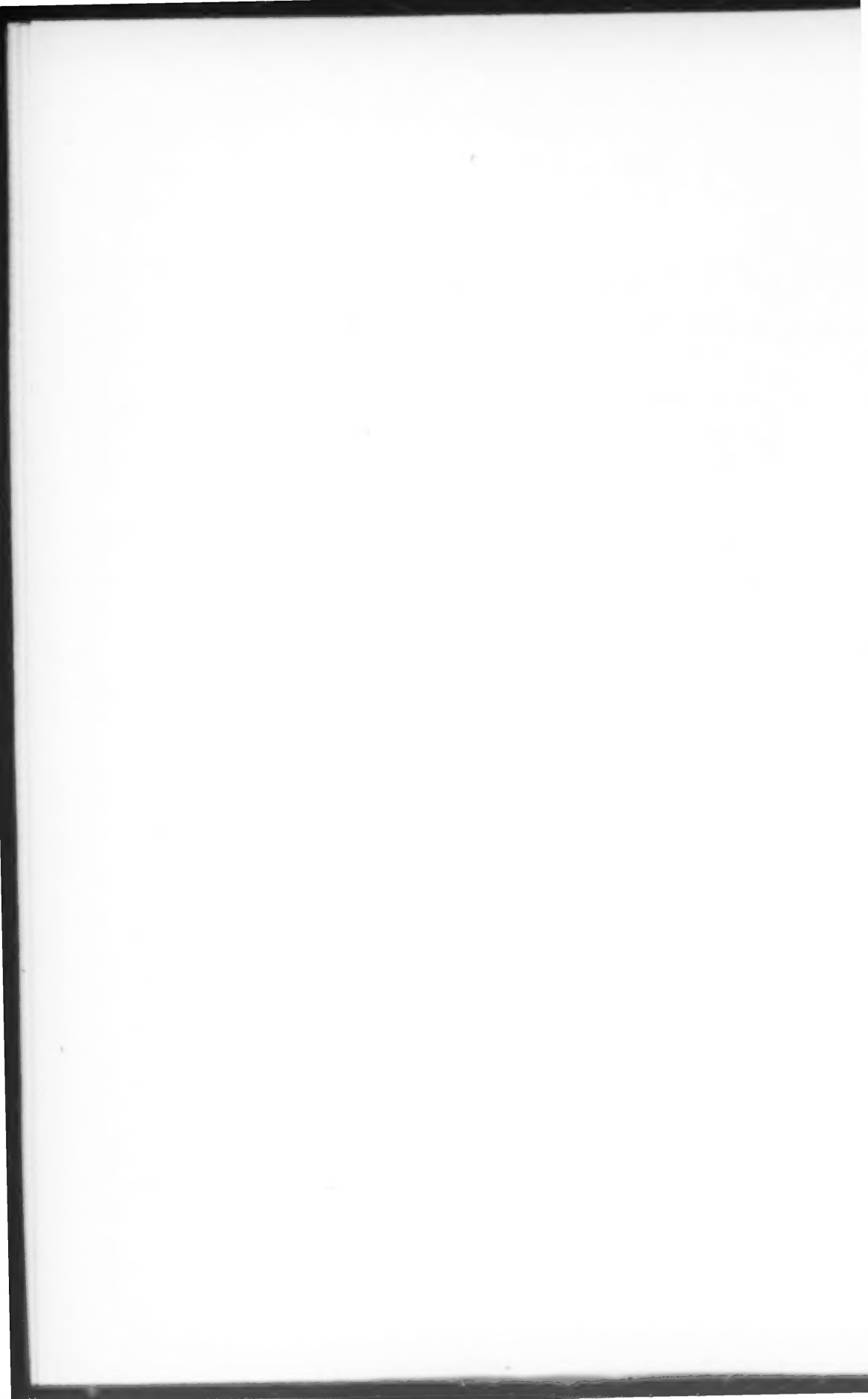
law in deciding this claim. Further, the federal question presented for the first time in this petition was never raised in the court below and petitioner did not present the issue in any form in his petition for leave to appeal to the Illinois Supreme Court. Therefore, there is no reason for this Court to consider this claim, and the petition for a writ of certiorari should be denied.



II.

THIS COURT HAS NO GOOD REASON TO CONSIDER WHETHER PETITIONER WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT BECAUSE PETITIONER HAS FAILED TO RAISE ANY FEDERAL QUESTION AND HAS RAISED ONLY ISSUES OF FACT WHICH ARE NOT MATTERS OF GENERAL IMPORTANCE MERITING THIS COURT'S ATTENTION. IN ANY EVENT, PETITIONER WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Petitioner asks this Court to grant certiorari to decide whether petitioner's guilt was established beyond a reasonable doubt. Specifically, petitioner claims that the People did not present sufficient evidence from which petitioner's intent to commit murder could be inferred and petitioner seeks to have this Court review the factual findings of the courts below.



In this case, petitioner does not dispute that he shot and killed the victim. The sole question raised is whether the requisite intent to commit murder was sufficiently established by the evidence. In Illinois the question of intent is to be resolved by the trier of fact and that finding will not be reversed on appeal unless the finding is inherently impossible or unreasonable. People v. Johnson, 70 Ill. App. 3d 149, 153, 388 N.E.2d 225, 228 (4th Dist. 1979).

This Court has held that, "[o]n review here of state convictions, all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court." Watts v. Indiana, 338 U.S. 49, 50 (1949); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960).

Petitioner now urges this Court to review the appellate court's factual determination that he was proven guilty beyond a reasonable doubt. Petitioner raises no federal question and thus, has not met a fundamental requirement to invoke the jurisdiction of this court.

Further, application of the reasonable doubt standard to any particular set of facts is not a matter of general importance meriting this Court's attention. As Justice Holmes once observed, "[w]e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). Although in In re Winship, 397 U.S. 358 (1970), this Court held that the State in a criminal case is Constitutionally required to prove an accused guilty of the charges against him beyond a reasonable doubt, respondent's

research of this Court's reported opinions reveals not one case in which this Court has exercised its discretionary jurisdiction to consider the question of whether an accused was in fact proven guilty beyond a reasonable doubt. Application of the standard to a particular factual situation is simply not a question of general importance.

Moreover, in the present case the People did prove petitioner's guilt beyond a reasonable doubt. At the trial in this case, petitioner testified in his own behalf and attempted to explain that he shot and killed the victim accidentally. The trial court weighed petitioner's testimony along with other evidence presented and found petitioner's version of the incident to be improbable, incredible and contrary to the physical evidence. Thus, from petitioner's undisputed act of knowingly engaging in a



struggle while holding a loaded gun with his finger on the trigger so that the gun was capable of being fired instantly, along with other evidence presented, the trial court correctly inferred the requisite intent to commit murder. The appellate court agreed with the trial court and specifically found the trial court's findings of sufficient evidence warranted. Apparently, the Illinois Supreme Court also agreed since this was the sole issue raised in the petition for leave to appeal to that court and that petition was denied.

Not only was the lower court's determination as to the sufficiency of the evidence correct, this case does not merit review by this Court both because no federal question is presented and because the question presented is not a matter of general importance. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the respondent respectfully prays that this Honorable Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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